WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2016

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Iowa
Milwaukee
Racine
Waukesha

MONDAY, MARCH 14, 2016

9:45 a.m.	13AP1724	-	Aman Singh v. Paul Kemper
10:45 a.m.	13AP646-CR	-	State v. Leopoldo R. Salas Gayton

WEDNESDAY, MARCH 16, 2016

9:45 a.m.	13AP2756	-	David M. Marks v. Houston Casualty Company
10:45 a.m.	14AP2484	-	Water Well Solutions Service Group Inc. v. Consol. Ins. Co.
01:30 p.m.	15AP179	-	Lands' End, Inc. v. City of Dodgeville

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
MONDAY, MARCH 14, 2016
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed in part, and reversed in part, a Racine County Circuit Court decision, Judge Gerald P. Ptacek presiding.

2013AP1724 Singh v. Kemper

This case examines issues raised by both the state and the defendant relating to how positive adjustment time (PAT) may or may not be applied retroactively to a prison sentence.

The defendant, Aman Singh, is a prisoner at the Racine Correctional Institution. He argues that § 973.198, Stats., which changed the role the sentencing court plays in reviewing prisoners' potential early release based on PAT, is unconstitutional.

The state says the Court of Appeals appropriately held that the procedural change in § 973.198 did not violate the ex post facto clauses, and the Court of Appeals appropriately concluded that Singh is not entitled to PAT for time spent in the county jail.

The state contends the Court of Appeals erred in holding that the retroactive application of provisions of 2011 Wis. Act 38 resulted in a penalty that violates the ex post facto clauses. The state argues that the Court of Appeals failed to apply the proper inquiry as to what constitutes an ex post facto violation.

Some background: In 2010, Singh was convicted and sentenced for obtaining a controlled substance by fraud, a class H felony. He was placed on three years of probation with a three-year bifurcated sentence imposed and stayed. In July of 2011, he committed another similar violation, for which he was convicted in November of that year. His probation on the first offense was revoked on Dec. 13, 2011. Two weeks later he was sentenced to a five-year bifurcated sentence on the second offense, to be served consecutively to the first offense sentence. His first day in prison was Jan. 4, 2012. Before that he had spent months in jail.

In 2009, as part of the biennial budget, 2009 Wis. Act 28, the legislature enacted a statutory scheme that gave prisoners various chances for early release. The law was effective Oct. 1, 2009. Two years later, the legislature enacted 2011 Wis. Act 38, which repealed or modified the early release provisions established in the 2009 Act, effective Aug. 3, 2011. The 2011 Act also created § 973.0198, Stats., which altered the procedures for procuring early release based on PAT purportedly earned through Aug. 3, 2011.

After his arrival in prison in early 2012, Singh sought early release pursuant to the provisions of the 2009 Act. The state Department of Corrections declined to process his request, concluding that with the enactment of the 2011 Act, Singh was not eligible for early release. Singh petitioned the circuit court for a writ of habeas corpus, which was denied.

Singh appealed. The Court of Appeals affirmed in part, reversed in part, and remanded.

Singh argued that he had passed his dates of eligibility for early release under the 2009 Act and should be considered for release under the law that was in effect at the time he committed, or was convicted and sentenced on, his offenses. He argued that applying the provisions of the 2011 Act to make him ineligible for early release violated the ex post facto clauses of the U.S. and Wisconsin Constitutions. He also argued that applying newly created § 973.198 violated the clauses, and he argued he was entitled to PAT based on time he spent in jail before he was sent to prison.

The Court of Appeals held that retroactive application of a law enacted after Singh committed crimes relevant to the appeal violates the ex post facto clauses of the U.S. and Wisconsin constitutions by denying him the opportunity for early release from prison which existed when he committed the offenses.

The Court of Appeals went on to conclude, however, that Singh was not eligible for PAT for the time he spent in the county jail, and it rejected Singh's claim that provisions in the new law adjusting the role of the sentencing court violates the ex post facto clauses.

WISCONSIN SUPREME COURT
MONDAY, MARCH 14, 2016
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl and Judge Ellen R. Brostrom presiding.

2013AP646-CR State v. Salas Gayton

This criminal case examines whether a sentencing court may rely on a defendant's illegal immigrant status as a factor in fashioning a sentence.

Some background: Leopoldo R. Salas Gayton was convicted after pleading no contest on one count of homicide by intoxicated use of a vehicle and one count of operating a motor vehicle without a license – causing death.

Gayton admitted that on Jan. 1, 2011, he drank at least 12 beers while driving around the Milwaukee metropolitan area, tossing the empty beer cans out of the window as he went.

Gayton turned onto an exit ramp and began driving the wrong way in the westbound lanes of I-94 in Milwaukee for approximately one mile. His vehicle scraped the side of a car that had pulled over to avoid a collision. Ultimately, he collided head-on into another vehicle, killing the 34-year-old mother who was driving it. A blood draw taken approximately two hours and 20 minutes after the collision showed that Gayton's blood alcohol concentration at the time of the test was still 0.145 percent.

Gayton had entered the United States illegally 14 years before the collision. He moved to Milwaukee approximately two years earlier. His attorney told the circuit court that he had "an almost completely clean criminal record." Gayton had a history of drug and alcohol use, but had apparently been sober for over three years. His drinking on Jan. 1, 2011, was allegedly caused by a disagreement he had with his girlfriend.

At Gayton's sentencing hearing, the circuit court gave a fairly extended sentencing statement. It listed the goals of the sentence as restitution, punishment, deterrence, and rehabilitation, although it acknowledged that it was not sure if the rehabilitation parts of extended supervision would occur because the court did not know if Gayton would be deported upon completion of his initial confinement.

The sentencing judge spoke at some length about the serious nature of the crime that had resulted in the death of a young woman. He also emphasized that there was a community need for deterrence, stating he had "seen too many young people killed" and "too many parents have come here and said they're tired of burying their kids."

The circuit court also focused some of its remarks on Gayton's history and his remorse for having killed the driver of the other vehicle and referenced Gayton's illegal entry into the country.

In discussing the conditions of Gayton's extended supervision, the circuit court ordered him to undergo a drug and alcohol assessment and to follow through with recommended treatment. In the course of discussing that topic the court noted:

"[Gayton] could have done that on his own, even as an illegal in this country [as] [t]here's plenty of places on the south side of Milwaukee that cater to Latinos that would help them with their drinking problems. He could have done that on his own. He didn't."

The circuit court concluded that Gayton's remorse was outweighed by the severity of his crime and that a prison sentence was necessary in order not to "unduly depreciate the seriousness of what [Gayton] did." The court ultimately sentenced Gayton to the maximum term of initial confinement of 15 years and required him to serve another seven years of extended supervision. The court also imposed a concurrent nine-month jail term on the count of driving without a license.

Gayton filed a motion for post-conviction relief, arguing that he should be able to withdraw his no contest plea because the court's recitation of the deportation warning did not follow the statute, and that he was entitled to resentencing because the circuit court had not adequately explained its sentencing rationale and had improperly relied on Gayton's immigration status. The circuit court denied the motion. (Judge Dennis R. Cimpl presided over the entry of the plea and sentencing; Judge Ellen R. Brostrom handled the post-conviction motion).

Gayton appealed, unsuccessfully challenging the circuit court's sentencing, among other issues. The Court of Appeals concluded that the circuit court had adequately explained its choice to impose the maximum 15 years of initial confinement and had considered the required, relevant factors in a reasonable way. Consequently, it found no abuse of discretion in the circuit court's sentencing statement.

Citing a series of cases decided by the U.S. Court of Appeals for the Seventh Circuit, the Court of Appeals stated that a sentencing court may not rely on a defendant's race, color or nationality in reaching a sentence, see United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986), but it may consider a defendant's immigration status as long as the sentencing judge does not make "unreasonably inflammatory, provocative, or disparaging" comments regarding that immigration status. See United States v. Flores-Olague, 717 F.3d 526, 535 (7th Cir. 2013); United States v. Tovar-Pina, 713 F.3d 1143, 1148 (7th Cir. 2013).

The Court of Appeals concluded that in this instance the sentencing judge "did not improperly rely on Gayton's status as an alien."

The Supreme Court has accepted the portion of Gayton's petition for review that asks whether it is proper for a sentencing judge to rely on a defendant's immigration status, and if not, whether such error automatically requires a resentencing or is subject to a harmless error analysis.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 16, 2016
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Richard J. Sankovitz presiding.

2013AP2756-CR Marks v. Houston Casualty Co.

This insurance case examines how a claim of breach of duty to defend is evaluated and whether the Court of Appeals may have previously reshaped its own precedent in this area of the law.

Some background: David M. Marks is the trustee of two trusts, the Irrevocable Children's Trust (ICT) and the Irrevocable Children Trust No. 2 (ICT2). As trustee, Marks is responsible for investing, managing, and growing the corpus of the two trusts. In the course of his duties as trustee, he allegedly invested and took a majority stock position in a company called Titan Global Holdings, Inc. He sat on the board of Titan, acted as the board's chair, and also served as an officer or director of Titan's subsidiaries. Marks alleged all of those positions were in furtherance of his duties as trustee.

Houston Casualty Co., Ltd., issued a professional liability errors and omissions insurance policy to Marks covering the period Oct. 28, 2008 to Oct. 28, 2009. The policy provides coverage up to $1 million for any loss or expenses relating to any claims, demands, or suits based upon or arising out of Marks's profession. In an endorsement, the policy states that the named insured's profession is "solely in the performance of services as the trustee of" ICT and/or ICT2. The policy, in part, contains the following exclusion:

> *IV. EXCLUSIONS*
>
> *This Policy does not apply either directly or indirectly to any Claim and Claim Expenses: . . .*
>
> *(b) For liability arising out of the Insured's services and/or capacity as:*
>
> *(1) an officer, director, partner, trustee, or employee of a business enterprise not named in the Declarations or a charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust.*

Marks was sued six times in five different states for his actions related to Titan. He submitted claims to Houston Casualty for each suit. Houston Casualty either refused or failed to provide a defense for Marks for any of the lawsuits. In November of 2009, Marks sued Houston Casualty and its surplus lines agent, Bedford Underwriters, Ltd. Marks sought various forms of relief based on Houston Casualty's failure or refusal to provide him a defense in the other lawsuits. Houston Casualty cross-claimed against Bedford, alleging that Houston Casualty was entitled to indemnity to the extent Houston Casualty was found liable to Marks.

All parties moved for summary judgment. The circuit court granted summary judgment in favor of Houston Casualty and Bedford on Marks's claims and dismissed Houston Casualty's cross-claim against Bedford.

The circuit court concluded in oral remarks from the bench that three published cases of the Court of Appeals, Grube,(Grube v. Daun, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992); Kenefick [(Kenefick v. Hitchcock, 187 Wis. 2d 218, 522 N.W.2d 261 (Ct. App. 1994)], and Radke,[(Radke v. Fireman's Fund Ins. Co., 217 Wis. 2d 39, 577 N.W.2d 366 (Ct. App. 1998)], lacked precedential authority.

The circuit court decided that Grube lacks precedential authority because the Court of Appeals panel that decided Grube lacked the authority to modify the estoppel rule that was previously stated in Professional Office Buildings, Inc. v. Royal Indem. Co., [145 Wis. 2d 573, 427 N.W.2d 427 (Ct. App. 1988)].

Marks appealed, and the Court of Appeals affirmed.

Marks contended that the circuit court erroneously concluded that Houston Casualty did not breach its duty to defend Marks in the other lawsuits. Marks argued that where there is a unilateral failure or refusal by the insurer to defend the insured so that the question is whether the insurer has breached its duty to defend, the insurer is not permitted to argue that an exclusion justified its refusal to defend. Marks's support for this argument comes from Grube, Kenefick, and Radke. The Court of Appeals agreed with the circuit court that in this respect, Grube, Kenefick, and Radke impermissibly conflict with the earlier decision in Professional Office Bldgs.

The Court of Appeals said to the extent that Grube, Kenefick, and Radke modified Professional Office Bldgs., the circuit court appropriately pointed out that the Court of Appeals lacked the authority to do so under Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Although the Court of Appeals in this case did not use the words "overrule," "modify," or "withdraw language," it said that the three cases "do not establish precedent for the modification of how a claim of breach of duty to defend is evaluated…"

The court said regardless of the desirability of the Grube approach, it was bound by its earlier decision in Professional Office Bldgs. Accordingly, it concluded the circuit court correctly assessed whether Houston Casualty breached its duty to defend by comparing the allegations in the complaints against Marks in the earlier lawsuits with the full Houston Casualty policy, including exclusions.

The Court of Appeals said nothing in Professional Office Bldgs. suggests that, in deciding breach of duty to defend issues, courts should deviate from the usual methodology which is to look to allegations in a complaint and first compare them with a policy's initial grant of coverage and, if coverage is found, then next see if any exclusions preclude coverage. If there are any such exclusions, a court must see if any exceptions to the exclusions reinstate coverage, the Court of Appeals said.

Marks says it was settled in Wisconsin that there are two tracks of analysis in duty to defend cases. See generally, Olson v. Farrar, 2012 WI 3, ¶¶26-42, 338 Wis. 2d 215, 228-34, 809 N.W.2d 1. If an insurer asks a court to review the policy to determine whether the insurer has a duty to defend, the insurer may litigate coverage by relying upon extrinsic evidence and policy exclusions. Id. at ¶¶35-41. If, however, the insurer makes a unilateral decision to deny coverage without seeking court approval, the insurer is barred from relying on either extrinsic evidence or police exclusions to litigate coverage. Grube v. Daun, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992).

Marks contends that the Court of Appeals' decision here dissolves the distinction between the two tracks of duty to defend law, overruling three prior published decisions and upsetting 20 years of established precedent.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 16, 2016
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge James R. Kieffer presiding.

2014AP2484 Water Well Solutions Service Group v. Consolidated Ins. Co.

The issues in this case arise from a dispute over insurance coverage for problems with a municipal well in the city of Waukesha.

The Supreme Court reviews, among other issues, whether the "four-corners rule" requires the Court to ignore undisputed facts that prove neither the "your product" and "your work" exclusions applies, or whether there are limited exceptions to the rule that allow the Court to consider extrinsic evidence when evaluating the duty to defend of an insurer that has outright denied coverage.

Some background: The city of Waukesha had hired Water Well Service Group to remove an old pump and install a new one. The pump later unthreaded and fell to the bottom of the well, allegedly because Water Well failed to install two set screws. The insurer of Waukesha Water Utility sued Water Well in U.S. District Court alleging negligence and breach of contract. Water Well tendered its defense to Consolidated Ins. Co. Consolidated denied coverage and did not provide a defense, relying on exclusions in its insurance policy. Water Well sued Consolidated in state court claiming at least some of the damages were covered and Consolidated had breached its duty to defend. The circuit court concluded that the insurer's duty to defend was determined by reviewing the four corners of the underlying complaint, without resort to extrinsic evidence. The Court of Appeals agreed. The Court of Appeals said the four-corners rule means that it must determine if the insured's duty to defend without considering extrinsic facts or evidence.

The Court of Appeals said the Consolidated policy covers property damage caused by an occurrence. It noted the underlying complaint alleged that Water Well's failure to reasonably and prudently install and reinstall the pump caused the pump to unthread and fall to the bottom of the well. It said Consolidated did not dispute that there was an initial grant of coverage. Consolidated relied instead on the application of two policy exclusions: the "your product" and "your work" exclusions.

Water Well argued the undisputed facts show there was damage to pipe that was not Water Well's product. In addition, Water Well relied on the same affidavit that averred some of the subject work performed by a subcontractor, which would trigger the subcontractor exception to the "your work" exclusion and provide arguable coverage and a duty to defend.

Water Well says dissenting Judge Paul F. Reilly, District II Court of Appeals, correctly pointed out that there is a conflict in Wisconsin law as to whether the four-corners rule is subject to limited exceptions. Water Well says recognizing and clarifying that there are exceptions to the four-corners rule would be consistent with precedent from the Wisconsin Supreme Court stretching back nearly 50 years.

Consolidated says because the allegations in the underlying complaint do not allege a claim covered under the policy, Water Well tries to manufacture a conflict in well-settled law and asks

that the Court look outside the four corners of the underlying complaint to consider extrinsic evidence or, in the alternative, to simply disregard the policy exclusions all together.

Consolidated says the lower courts correctly determined that Consolidated had no duty to defend Water Well in the underlying action and therefore did not breach its duty to defend.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 16, 2016
1:30 p.m.

In this bypass of the District IV Court of Appeals (headquartered in Madison), the Supreme Court reviews a decision by Iowa County Circuit Court, Judge Craig R. Day presiding. A party may ask the Supreme Court to take jurisdiction of an appeal or other pending Court of Appeals' proceeding by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass usually meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the Court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.

2015AP179 Lands' End, Inc. v. City of Dodgeville

This bypass of the Court of Appeals arises from lengthy litigation between Lands' End Inc. and the city of Dodgeville over the fair market value, and resulting tax assessments, of the parcels upon which its headquarters is located.

Some background: In September 2013, in appeal no. 2010AP1185, the Court of Appeals remanded to the trial court "with directions to enter judgment in favor of Lands' End in the amount of $724,293.68, plus statutory interest and any other interest or costs to which Lands' End may be entitled." Following remand, Lands' End filed a motion for entry of judgment, seeking an award of interest at the rate of 12 percent per year from July 1, 2009, the date on which Lands' End served an offer of settlement pursuant to § 807.01(4), until the amount of the judgment was paid in full.

Section 807.01(4), as it existed when the offer of settlement was made, provided that if "the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid."

In 2011, the legislature enacted 2011 Wis. Act 69, which amended § 807.01(4), as well as § 814.04(4), relating to interest from the time of verdict, decision, or report until judgment, and § 815.05(8), which provides that "every execution upon a judgment for the recovery of money shall direct the collection of [a specified annual interest rate]."

Act 69 changed the annual interest rate in each of the above statutes from "an annual rate of 12%" to "an annual rate equal to 1 percent plus the prime rate in effect on Jan. 1 of the year in which the judgment is entered if the judgment is entered on or before June 30 of that year or in effect on July 1 of the year in which the judgment is entered if the judgment is entered after June 30 of the that year, as reported by the Federal Reserve Board in Federal Reserve Statistical Release H.15. . . ."

The city argued that the amended version of the statute, calling for interest at the prime rate plus 1 percent, applied because the amended version of the statute was in effect on the date the judgment was entered. Lands' End argued it was entitled to interest at the rate of 12 percent under the old version of the statute.

On Oct. 13, 2014, the circuit court issued a decision providing for interest at the prime rate plus 1 percent.

After the circuit court in this case issued its decision, the Court of Appeals issued a decision in Johnson v. Cintas Corp. No. 2, 2015 WI App 14, 360 Wis. 2d 350, 860 N.W.2d 515,

holding that the amendment to § 807.01(4) was substantive and that retroactive application would be unconstitutional. This court granted a petition for review in Johnson, which was later voluntarily dismissed.

Lands' End argues that the Court of Appeals' decision in Johnson, held that the applicable interest rate under § 807.01(4) is 12 percent, the rate that was in effect the date an offer of settlement was served, is squarely on point.

As a result, Lands' End argues that the trial court's decision regarding interest should be reversed, and the matter should be remanded with directions to the trial court to enter an amended judgment awarding interest at the rate of 12 percent per year pursuant to the old version of the statute.

The city argues that the plain language of § 807.01(4) requires that interest be awarded at 1 percent plus the prime rate in effect when judgment is entered. It says despite this clear statutory language, the Court of Appeals in Johnson held that the applicable interest rate under the statute is the rate in effect on the date the offer of settlement was made. The city says in effect the Court of Appeals in Johnson rewrote the statute and usurped the role of the legislature. A decision by the Supreme Court is expected to resolve the apparent conflict between the statutory language and the Court of Appeals' Johnson decision.